Provisional

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International Law Commission

Seventieth session (first part)

Provisional summary record of the 3391st meeting
Held at Headquarters, New York, on 1 May 2018, at 10 a.m.

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18-06915 (E)

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Filling of casual vacancies in the Commission (agenda item 2) (A/CN.4/721 and A/CN.4/721/Add.1)

The Chair said that the Commission would proceed to fill the seat that had become vacant owing to the resignation of Mr. Roman Anatolyevich Kolodkin. As was customary, the election would be held in a closed meeting.

The meeting was suspended at 10.10 a.m. and resumed at 10.25 a.m.

The Chair announced that Mr. Evgeny Zagaynov had been elected to fill the casual vacancy resulting from the resignation of Mr. Roman Anatolyevich Kolodkin. On behalf of the Commission, he would inform the newly elected member and invite him to take his place in the Commission.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (A/CN.4/712 and A/CN.4/715)

The Chair invited the Commission to resume its consideration of the fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715).

Mr. Hassouna expressed his gratitude to the Special Rapporteur for his clear and well-structured report, which would provide a sound basis for the second reading of the draft conclusions. He also commended the Secretariat for preparing an analytical table of the comments and observations of States made on the topic in the Sixth Committee of the General Assembly, as well as the written comments and observations received in response to the Commission's request, contained in document A/CN.4/712. Regrettably, however, those written comments and observations, which formed the basis of his recommendations, were limited in number and came mainly from developed States. Although he acknowledged the value of the draft conclusions and commentaries proposed by the Special Rapporteur, he agreed with certain States that the draft conclusions were at times too general and could benefit from additional normative content and clarification, a concern that could largely be met if the draft conclusions were read in conjunction with the commentaries.

He agreed with the Special Rapporteur that draft conclusion 1 [1a] (Introduction) should remain in its current form, as it was purely introductory in nature. On draft conclusion 2 [1] (General rule and means of treaty interpretation), he supported the proposal to reflect more in the commentary the fact that the rules on interpretation applied to treaties predating the 1969 Vienna Convention on the Law of Treaties. He agreed that the meaning of the word "appropriate" used in paragraph 5 should be clarified and that a reference to the nature of the treaty as a relevant factor should be included in the commentary, but not in the text of the draft conclusion. He welcomed the recommended change to the Spanish version of the draft conclusion.

With regard to the formulation of draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation), unlike some States, he believed that the terms "objective evidence" and "authentic means of interpretation" were appropriate when describing the nature and role of subsequent agreements and subsequent practice. In relation to paragraph 1 of draft conclusion 4 (Definition of subsequent agreement and subsequent practice), he agreed that it should be specified in the commentary that a subsequent agreement did not have to be a treaty within the meaning of the Vienna Convention, but could also be an informal agreement and a non-binding arrangement. He also agreed that the guidelines of the Commission on reservations to treaties, which dealt with interpretive declarations, should be harmonized with the draft conclusions, and that the definite article "a" at the beginning of paragraph 2 should be deleted. He was not, however, in favour of adding the word "all" to the paragraph to make clear that the agreement of all the parties was required. He supported the proposal that paragraph 3 should be clarified further in the commentary and that the inverted commas around the phrase "subsequent practice" should be moved.

He agreed with the Special Rapporteur's recommendation that paragraph 1 of draft conclusion 5 (Attribution of subsequent practice) should be reformulated, to make it clearer that not every form of conduct that might be attributed to a State under the rules of State responsibility was sufficient to count as subsequent practice for the purpose of treaty interpretation. He also believed that States' concerns about the conduct of non-State actors should be addressed in the commentary, to make it clearer that such conduct could not, as such, be relevant for the interpretation of a treaty. He agreed that reference should be made to draft conclusion 12 [11] in the commentary to the draft conclusion, and that such reference was without prejudice to any other possible effects of the practice of international organizations.

He agreed with the proposal that the term "*modus vivendi*" in paragraph 1 of draft conclusion 6 (Identification of subsequent agreement and subsequent

practice) should be clarified in the commentary, rather than in the draft conclusion. For that purpose, a number of examples could be given. As suggested by the Special Rapporteur, the words "for example" should be inserted after the words "this is not normally the case", and the word "normally" should be removed, to clarify that the proposal mentioned in paragraph 1 was merely an example. With regard to paragraph 2, it would be appropriate to provide in the commentary examples of the forms that subsequent agreements and subsequent practice could take.

With regard to paragraphs 1 and 2 of draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), he supported the idea that the word "clarify" should be further explained in the commentary, to show that it covered all possible effects of article 32 of the Vienna Convention. States had expressed different views on whether the subsequent practice of the parties could lead to the modification of a treaty. The Special Rapporteur right provided a general direction to that question in paragraph 3 without resolving it; he also gave a good description of States' points of view in the commentary. Accordingly, the sentence according to which "[t]he possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized" should be retained. The distinction between interpretation and modification was a complex one, and it should be explained in the commentary rather than in the text of the draft conclusion.

Turning to draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time), he said that, unlike certain States, he did not believe that the issue of interpretation of treaty terms as capable of evolving over time should give rise to any misunderstanding, since the Special Rapporteur had explained that it merely indicated that subsequent agreements and subsequent practice under articles 31 and 32 might assist in determining whether the meaning of a term was capable of evolving over time; he had not claimed that the ability to evolve depended only on the willingness of the parties to the treaty.

It was important to distinguish between, on the one hand, repeated practice as a means of interpreting an international treaty and, on the other hand, practice that led to the formation of a norm of customary international law. That distinction should be referred to in the commentary to draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), or in the commentary to another draft conclusion of a more general nature. The weight of a subsequent agreement and that of a subsequent practice could be referred to in separate paragraphs to clarify the distinction. He agreed that in paragraph 2 of the draft conclusion, which referred exclusively to subsequent practice, the criteria of consistency and breadth should be mentioned as possible factors for determining the weight of subsequent practice.

With regard to paragraph 1 of draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), he agreed that the sentence according to which "[t]hough it shall be taken into account, such an agreement need not be legally binding" should be clarified and better drafted. He saw merit in the idea that reference should be made in the commentary both to binding agreements and to agreements which, although not binding, could be taken into account. However, the word "though" at the beginning of the sentence was misleading. The sentence should be reformulated, either to say that "such an agreement need not be legally binding for it to be taken into account" or, as suggested by the Special Rapporteur, to say that "[s]uch an agreement, may, but need not necessarily be, legally binding for it to be taken into account".

One State had raised the concern that paragraph 2 of draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties) might suggest that the work of conferences of States parties generally involved acts that might constitute subsequent agreements or subsequent practice. As it stood, paragraph 2 did not completely allay that concern, despite the indication in the last sentence that decisions adopted within the framework of a conference of States parties often provided a non-exclusive range of practical options for implementing the treaty. Further clarification should therefore be provided in the commentary. With regard to paragraph 3, he also agreed that it should be made clear in the commentary that the same principles would apply to other forums that constituted meetings of States parties to a particular treaty. He did not, however, agree with the proposal that the reference to consensus at the end of the paragraph should be moved to the commentary on the grounds that it could lead to misrepresentation. Nor should the phrase "including by consensus" be placed in brackets: doing so might suggest that the phrase did not belong in the sentence. The relevant section might be reformulated to read: "regardless of the form and procedure by which the decision was adopted, whether by majority or consensus".

He agreed that there was a need to distinguish more clearly in paragraphs 2 and 3 of draft conclusion 12 [11] (Constituent instruments of international organizations) between, on the one hand,

subsequent agreements and subsequent practice of the States parties to a constituent instrument of an international organization and, on the other hand, the practice of an international organization as such. He therefore supported the Special Rapporteur's recommendation that the words "of the parties" could be inserted after the words "subsequent practice" in paragraph 2. As for paragraph 3, a clear criterion should be included in the commentary concerning the weight to be given to the practice of international organizations. For instance, it could be stated that the practice of an international organization generally accepted by its members States carried more weight, or that the members' agreement to such a practice was a primary factor in determining its weight. He supported the view that the Commission should continue to distinguish between the law between States and the law of international organizations. It was therefore not desirable for the scope of the draft conclusions to be extended to treaties that fell under the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

It should be made clear in the commentary that the term "international organizations" referred simply to intergovernmental organizations. He did not agree, however, with the proposal to distinguish, in the draft conclusion or in the commentary, between the different organs of an international organization, given that there was a huge variety of such organizations. He supported the Special Rapporteur's proposal that a sentence should be included in the commentaries according to which the rules on the responsibility of international organizations and the considerations underlying draft conclusion 5 applied mutatis mutandis. Moreover, in order to distinguish between the subsequent practice and agreements of States, on the one hand, and the subsequent practice of the international organization, on the other hand, he agreed that reference should be made in the commentary to the need to identify the intention of the State concerned, as well as the content and circumstances of the organ's decision.

With regard to the need to elaborate on the relevance of silence in the draft conclusion, the Special Rapporteur had proposed adding a sentence in paragraph (22) of the commentary referring to a recent judgment of the European Court of Justice in the *Europäische Schule München v. Silvana Oberto and Barbara O'Leary* case. That proposal should be clearly explained. While the European examples cited in the commentary regarding the expression "rules of the organization" in paragraph 4 were welcome, examples from other regions would also be appropriate.

After a thorough debate within the Commission, the Special Rapporteur had agreed to make significant changes to his original draft conclusion 13 [12] (Pronouncements of expert treaty bodies). That display of flexibility was commendable. As a general rule, he agreed with the Special Rapporteur that the value of pronouncements of expert treaty bodies for the interpretation of treaties should not be overestimated, especially where an attempt was being made to modify or amend such treaties. He supported the proposal to replace the word "rules" in paragraph 2 with "terms", in reference to a treaty, as the latter was a common formulation. He was also in favour of replacing the phrase "shall not be presumed to constitute subsequent practice" in paragraph 3 with "shall not be presumed to constitute its acceptance of a subsequent practice". The word "accepting" should be replaced with "following", something that would be consistent with the recommendation of the Special Rapporteur. The "without prejudice" clause in paragraph 4 represented a compromise solution that had been added by the Commission after a lengthy debate, and should therefore be retained, despite the Special Rapporteur's proposal to reopen the debate.

With regard to the final form of the draft conclusions, he was in favour of retaining the term "conclusions". He also supported the Special Rapporteur's proposed recommendations to the General Assembly.

In conclusion, he congratulated the Special Rapporteur for his work, which represented an important achievement and a significant contribution to the codification of international law.

Mr. Park said that he wished to commend the Special Rapporteur's considerable effort in finalizing his fifth report. The fact that Member States had not raised fundamental concerns showed that the Special Rapporteur's work had been well-received and was near completion. The Special Rapporteur's responses to States' comments were also generally appropriate.

In paragraph 1 of draft conclusion 4, it would be useful to insert the word "all" before "the parties", because a subsequent agreement under article 31 (3) (a) of the Vienna Convention referred to an agreement among all the parties; the Special Rapporteur had stated as much in the commentary and in his report. It would, however, be worth making that point in the draft conclusion, as opposed to in the commentary. That proposed change would not apply, however, to paragraph 3, which referred to conduct by one or more parties. While the change would logically apply to paragraph 2, he was hesitant because paragraph 2 of

draft conclusion 10, on the agreement of the parties regarding the interpretation of a treaty, provided for the possibility of silence on the part of one or more parties.

The Special Rapporteur had proposed moving the phrase "in application of the treaty" to the end of paragraph 1 of draft conclusion 5. That change was intended to make it clear that actions taken by a State official, while attributable to that State, could not constitute subsequent practice for the purposes of interpreting the treaty. While agreeing with that intention, he believed that the proposed change merely created additional difficulties. He therefore suggested deleting the phrase altogether. The words "may consist of", which already appeared in paragraph 1, adequately addressed the problem.

With regard to draft conclusion 6, he agreed in principle with the concern that had led the Special Rapporteur to recommend that, in the second sentence of paragraph 1, the word "normally" should be replaced with "always" and that the words "for example", preceded by a comma, should be inserted between the words "case" and "if". The proposed wording was intended to make clear the illustrative nature of the reference to temporary non-application or *modus vivendi*, which were given as two types of cases that did not constitute subsequent agreements or subsequent practice under article 31 of the Vienna Convention. However, replacing the word "normally" with the word "always" could increase the possibility of such agreements being considered subsequent agreements or subsequent practice under article 31. He was thus not convinced that the Special Rapporteur's suggestion was in line with the commentary in that regard.

The current formulation of draft conclusion 7, paragraph 3, seemed to adequately cover the divergent views that had been expressed during in-depth debates within the Commission, in particular in the Drafting Committee, on the question of whether subsequent practice of the parties could lead to the modification of a treaty.

Turning to draft conclusion 9, he recalled that the Special Rapporteur had proposed inserting the words "on its consistency, breadth and" in paragraph 2, between the words "addition" and "on", in response to a suggestion by the United Kingdom. However, the proposed amendment was unnecessary and even inconsistent with other parts of the text. It was not clear to him whether "breadth" was meant to refer to "narrowing" or "widening", since the second sentence of the first paragraph of draft conclusion 7 contained both terms. Furthermore, the word "consistency" might be redundant, given that the phrase "how it is repeated" already appeared in the draft conclusion, and further clarification could be provided in the commentary.

With regard to the draft conclusion 10, he considered that it would be appropriate to retain the text as it stood. It would also be advisable to retain the current text of draft conclusion 11. As noted by Mr. Hassouna, the Special Rapporteur's suggestion of putting the words "including by consensus" in brackets could create more confusion.

He supported the Special Rapporteur's proposal to insert the words "of the parties" between the words "practice" and "under" in paragraph 2 of draft conclusion 12. As many States had pointed out, it was necessary to distinguish between the subsequent practice and subsequent agreements of States, on the one hand, and the subsequent practice of international organizations, on the other.

He did not entirely agree with the Special Rapporteur's recommended amendments to draft conclusion 13. In its current formulation, the draft conclusion represented a compromise between members of the Commission who had had diverging views about the Special Rapporteur's initial proposal. It should also be recalled that the proposed new paragraph, which would give the role of expert treaty bodies recognition beyond that expressed in the "without prejudice" clause in the current paragraph 4, was not new; the Commission had decided not to adopt a similar proposal made by the Special Rapporteur in his fourth report. The insertion of the new paragraph between the existing paragraphs 3 and 4 would have two major consequences. First, the relationship between the new paragraph and the current paragraph 4 would be unclear and generate unnecessary confusion. Secondly, it would be impossible to maintain a balance between the progressive approach and the conservative approach to the role of expert treaty bodies. However, he was not opposed to the consideration of the proposed changes to the current paragraph 3.

He supported the Special Rapporteur's position on the final form of the draft conclusions. He appreciated the efforts of the Special Rapporteur and his contribution to the finalization of the draft conclusions, and hoped that the Commission would be able to adopt the draft conclusions on second reading during the current session.

Mr. Murphy commended the Special Rapporteur on his cooperative spirit and extraordinary work on the topic over the years, which would no doubt be successfully concluded in the current session.

While States were generally supportive of the Commission's draft conclusions on the topic, they had expressed a number of serious concerns that called for changes not only in the draft conclusions themselves but also in the commentary, some of which had been satisfactorily addressed by the changes proposed by the Special Rapporteur. However, additional changes to some of the draft conclusions were warranted where they pointed out an error, inconsistency or unhelpful ambiguity in the Commission's work. Furthermore, given that the current topic and that of identification of customary international law were in their final stages, it was appropriate to consider cross-over aspects between the two topics to ensure consistency in the way they were handled.

Several States had expressed concerns regarding paragraph 1 of draft conclusion 5, with some viewing the concept of attribution as inappropriate in the context of identifying the relevance of the subsequent practice of States or parties to a treaty. The Special Rapporteur had attempted to address those concerns through a modest fix, but the best solution would be to reformulate the paragraph to mirror draft conclusion 5 on identification of customary international law, which had moved away from the idea of attribution to a formulation that had been readily accepted by States. Thus, paragraph 1 could read: "Subsequent practice under articles 31 and 32 may consist of any conduct of the party to the treaty, whether in the exercise of its executive, legislative, judicial or other functions."

With respect to draft conclusion 7, paragraph 3, the Czech Republic was correct to indicate that there was no basis for the presumption expressed in the first sentence, at least as it related to a subsequent agreement. If, for example, two States concluded a bilateral treaty and decided five years later to conclude an agreement relating to that treaty, that agreement might be either interpreting the bilateral treaty or amending it. There was no basis for saying that there was a presumption in favour of one type of agreement or the other. The simplest solution would be to delete that sentence.

In relation to draft conclusion 8, he agreed with the Czech Republic and the United States that the word "presumed" should be deleted, as it appeared to be confusing. Unless the Special Rapporteur could explain why "presumed intention" was a superior formulation to "intention", the latter should be used.

He did not support the changes to paragraph 2 of draft conclusion 9 proposed by the Special Rapporteur in response to a suggestion by the United Kingdom. It was critical to understand that, at the current stage of its work, the Commission had already established that there was a subsequent practice of the parties under article 31 (3) (b) of the Vienna Convention. That meant, therefore, that there was already a subsequent practice establishing the agreement of all the parties to the treaty. The question that required clarification was how much weight should be given to that subsequent practice. It made no sense to suggest that factors such as consistency or breadth of the practice were of any further relevance; consistency and breadth must already exist for the practice to establish the agreement of all the parties. Indeed, introducing such changes to paragraph 2 would seem to be reopening the debate on whether subsequent practice of the parties within the meaning of article 31 (3) (b) existed at all.

Several States had proposed clarifying the language of draft conclusion 10, paragraph 1, in particular the second sentence. Like Mr. Hassouna, he supported the improvement proposed by the Special Rapporteur, in paragraph 90 of his report, whereby the sentence would read: "Such an agreement may, but need not necessarily be, legally binding for it to be taken into account." He hoped the issue would be pursued in the Drafting Committee. However, the first sentence also needed improvement. With its reference to a "common understanding ... which the parties are aware of", it seemed to imply that each of the parties must be aware of a common understanding, which made sense for a subsequent agreement under article 31 (3) (a) of the Vienna Convention, but was not a requirement in the context of subsequent practice under article 31 (3) (b). As a case in point, if all the supreme courts of the States parties to a treaty interpreted an ambiguous provision of the treaty in the same way, without any awareness of each other's decisions, those decisions would constitute subsequent practice in the application of the treaty which established the agreement of the parties regarding the interpretation of that provision. There was no need to further establish that each supreme court was aware of a common understanding among all the supreme courts involved. Indeed, such a requirement would make article 31 (3) (b) no different from article 31 (3) (a), because a subsequent agreement between the parties would be required for both. A very simple solution would be to delete the words "a common" in the first sentence and replace them with "the same", so that it read: "... requires the same understanding regarding the interpretation of a treaty which the parties are aware of and accept."

The comments made by Governments with respect to draft conclusion 11 indicated some concern that decisions of conferences of States parties should not be too readily regarded as a subsequent agreement or subsequent practice under article 31 (3) of the Vienna

Convention. With respect to paragraph 3 of the draft conclusion, unlike Mr. Hassouna and Mr. Park, he fully supported the Special Rapporteur's suggestion that the words "including by consensus" should be placed in parentheses, and hoped that the point would be pursued in the Drafting Committee. The current formulation, which had the clause appearing at the end of the paragraph, might be interpreted as referring, not to the immediate prior clause, but to the one before that. Inserting parentheses would make it much clearer that it was intended to modify the immediate prior clause. The words "in substance" could be deleted from the paragraph, as they seemed to suggest that something less than a full agreement of the parties was required. Such qualifying language was not used in other draft conclusions when reference was made to an agreement. It would also be prudent to insert the word "all" before "the parties", given that not all the parties to a treaty were necessarily present at a conference of States parties, and yet all of them must be present for there to be a "subsequent agreement" based on a decision at the conference.

Though States generally supported draft conclusion 12, which dealt with the constituent instruments of international organizations, many had offered specific comments that should be addressed, in particular regarding the reference in paragraph 3 to article 31 (1) of the Vienna Convention. It was worth recalling that that reference had been added in the Drafting Committee at the last minute, and had not been part of the Special Rapporteur's original analysis and proposal for the draft conclusion. The central problem was that the subsequent practice of an international organization could not be regarded as part of any of the elements set forth in article 31 (1). It was certainly not part of the text or context of the treaty, nor could it be considered part of the object or purpose of the treaty.

The Special Rapporteur maintained that the reference was appropriate, on the basis of case law of the International Court of Justice, but those judgments did not indicate that the practice of an international organization contributed to the interpretation of a treaty pursuant to article 31 (1). Rather, in each instance, the Court clearly viewed the practice of the international organization as an element separate from article 31 (1). The Special Rapporteur also relied on a 2013 judgment of the Caribbean Court of Justice, but that decision made no reference to article 31 (1). Moreover, the Caribbean Court of Justice did not use the practice of an organ of the Caribbean Community (CARICOM) to ascertain the object and purpose of the Revised Treaty of Chaguaramas. It used such practice because specific articles of the Treaty either referred to the undertakings of member States to carry out the obligations arising out of decisions of CARICOM organs (article 9) or referred to a right conferred by or under the Treaty (article 222). In short, the practice of the organ was relevant owing to the powers conferred upon it, not to its ability to reveal any information about the object and purpose of the treaty.

However, even if it was accepted that the practice of an international organization in the application of its treaty was sometimes intended to fulfil the object and purpose of the treaty, that was not the same as accepting that the practice itself constituted the object and purpose of the treaty, which was the implication of the reference to article 31 (1). An interpreter seeking to determine the object and purpose of a treaty constituting an international organization would look at the treaty itself, not at subsequent events, such as court decisions, scholarly writings or the practice of the organization, including an opinion of the organization's legal counsel. Such subsequent events might serve as a guide to the object and purpose of a treaty, but it would be completely incorrect to say that they were constitutive of the object and purpose of the treaty. Indeed, a real danger with the reference to article 31 (1) was that it might elevate the practice of the international organization to a position superior to that of the practice of the parties to the treaty (article 31 (3)). That simply could not be correct. Paragraph 3 of draft conclusion 12 should be amended to mirror the current wording of paragraph 4 of draft conclusion 13, to read: "This draft conclusion is without prejudice to the contribution that the practice of an international organization may otherwise make to the interpretation of a treaty."

Regarding draft conclusion 13, the Special Rapporteur had surprisingly decided to reintroduce, as a new paragraph between paragraphs 3 and 4, a proposal he had previously made that had been thoroughly debated and rejected by the Commission, even though no State had requested that he do so. In resurrecting his proposal, the Special Rapporteur had failed to note that some States, such as the Czech Republic, did not even like the "without prejudice" clause in paragraph 4, which he basically wished to enhance. For the same reason that the Commission had rejected the proposal in 2016, it should reject it again in 2018. The problem was not just about the scope of the topic, which was how the Special Rapporteur had characterized the issue. It was certainly true that the pronouncements of expert treaty bodies did not represent subsequent practice of the parties to a treaty and were therefore not part of the topic. However, the focus of the topic under consideration was the subsequent agreements and subsequent practice of the parties to a treaty; suddenly

inserting other forms of action into the equation, as though they were comparable, would be confusing. Indeed, a large number of States had indicated that they would be concerned if the Commission were to create an implication that pronouncements of expert treaty bodies constituted subsequent practice. Yet, adding the Special Rapporteur's resurrected paragraph would do exactly that. Moreover, the implication would be made even worse is such pronouncements were said to be constitutive of the object and purpose of the treaty, a sudden development for the topic that would catch States completely off guard. The Special Rapporteur's proposed addition of a new paragraph to draft conclusion 13 should therefore not be accepted by the Commission.

In conclusion, he commended the Special Rapporteur for his extraordinary effort in moving forward a topic that addressed very complicated issues. He also supported the referral of the draft conclusions to the Drafting Committee.

Mr. Hmoud sought further clarification about Mr. Murphy's concerns regarding the current formulation of draft conclusion 5, paragraph 1, in respect of the conduct of organs of the State in the performance of their judicial, administrative and executive functions. It was his understanding that that formulation was the same as the formulation relating to attribution under State responsibility. He wondered what kind of attribution Mr. Murphy wished to exclude.

Mr. Murphy said that a similar issue had arisen regarding the topic of identification of customary international law. The Commission had considered characterizing the relevant practice of a State as turning on attribution in some way, which, of course, triggered the concept of State responsibility. However, a decision had been taken to move away from the concept of attribution and to speak more broadly about the conduct of the party in the exercise of its various functions. That had helped avoid the confusion about *intra vires* and *ultra vires* conduct in matters of that type, which arose when talking about attribution. His proposal was therefore to see whether there was any possibility of harmonizing the approach taken in draft conclusion 13 with the approach taken in draft conclusion 5 on identification of customary international law.

The meeting was suspended at 11.40 a.m. and resumed at 12 noon.

Mr. Tladi said that he wished to commend the Special Rapporteur on his report and on his hard work, dedication and leadership throughout the Commission's consideration of a very important topic.

He had been somewhat sceptical when the topic had been placed on the agenda as a "normal topic", and had questioned whether the Commission would be able to adopt draft conclusions that had sufficient normative content to be useful, without rewriting the 1969 Vienna Convention. However, as had been clear from the Special Rapporteur's introduction of his report, the Commission had achieved a balance for the most part, thanks to the interplay between the ambition of some members — which might have resulted in the rewriting of the Convention — and the conservative approach of others, which could have led to a meaningless and purely descriptive text. That delicate and sophisticated dance had led to a general acceptance of the product; he therefore joined the Special Rapporteur in cautioning members against undoing its results.

He agreed with most of the Special Rapporteur's recommendations. In his introduction, the Special Rapporteur had suggested that few written observations had been received on the topic because of the consensus-building approach that had been taken. Unfortunately, that was not the case; it was common for few written observations to be received. For that reason, he endorsed the Special Rapporteur's decision not to limit the consideration of comments from States to the observations received at the time of writing of the report. Many States, for reasons that were known, did not submit comments in writing; therefore, an over-reliance on written submissions could result in a loss of balance. According to footnote 6 of his report (A/CN.4/715), not a single African or Asian State, and only one Latin American State, had submitted written observations.

The Special Rapporteur had reported that, in reference to a statement made in the commentary to draft conclusion 3, Poland had found it difficult to agree that subsequent agreements were not necessarily binding. The Special Rapporteur had responded by referring to the discussions concerning the phrase "legally binding" in draft conclusion 10. Yet, that phrase referred to the legal nature or form of the agreement, rather than to its consequence for legal interpretation, which was the subject of the commentary to draft conclusion 3. The Commission was correct on both fronts to conclude that the agreements were not legally binding; with respect to the consequences for interpretation, subsequent agreements and subsequent practice were not conclusive, being only a means to be taken into account, while with regard to the legal nature of the agreement, subsequent agreements did not need to be binding.

In connection with the above, while agreeing with Austria and the United Kingdom that draft conclusion 4,

paragraph 1, should specify that a subsequent agreement need not be legally binding, he was willing to go along with the Special Rapporteur's assertion that the matter had already been made sufficiently clear in draft conclusion 10.

Regarding draft conclusion 5, paragraph 1, in response to comments from Ireland and the United States that not every act attributable to a State under international law could constitute subsequent practice under article 31 (3) of the Vienna Convention, the Special Rapporteur had recommended moving the words "in the application of a treaty" to the end of the sentence. Although he was not opposed to the Special Rapporteur's recommendation, he did not support it. He did not have any firm proposals to address the concerns of Ireland and the United States, but he doubted that the fix proposed by the Special Rapporteur would do so. The United States, for example, had referred to conduct by a State agent that was "contrary to instructions". Presumably, those actions could also be "in the application of a treaty". There were two possible solutions. First, although he would not be in favour of it, the Commission could decide and explain in the commentary that the word "may" made it clear that not all such conduct constituted subsequent practice. Secondly, a more difficult but preferable solution would be for the Drafting Committee to try to find a formulation that would be included in the commentary and that would require, over and above attribution, some level of government awareness and acceptance of the conduct, in order to address the concerns of those States. The Special Rapporteur was on the right track when he indicated in his report that such conduct must also be undertaken in a "recognized application of the treaty". He had not had the opportunity to fully examine the proposal made by Mr. Murphy, but he was willing to consider it as a possible fix in the Drafting Committee.

He supported the Special Rapporteur's recommendation to amend the second sentence of draft conclusion 6, paragraph 1, on the strength of the comments made by Ireland. He had never liked that sentence, but the amendment made it somewhat more bearable. He also concurred with the Special Rapporteur, as indicated in his introduction, that while his decision to replace the word "normally" with "always" might raise new difficulties, that was something that the Drafting Committee might be able to address.

From the beginning, he had had some difficulty with the inclusion of draft conclusion 7, paragraph 3. Indeed, the current wording, which he did not disagree with, had been arrived at following a lengthy debate that had incidentally been linked to the question of whether subsequent agreements and subsequent practice had binding effects. By even venturing into the discussion, the Commission was moving beyond the scope of article 31 (3) and into areas not falling within the current topic, including modification. Thus, while the final wording chosen by the Commission might meet with his agreement, he was still unsure whether the Commission should be venturing into such areas. He was therefore not surprised that the Special Rapporteur had indicated that there had been such a divergence of views among States regarding that particular paragraph.

Prior to the current meeting, he could have accepted the Special Rapporteur's recommendation to amend the second paragraph of draft conclusion 9 in response to the comments of El Salvador, the Russian Federation and the United Kingdom. Regarding the comment made by Mr. Park concerning the use of the word "breadth", he said that in the current context it referred to how often the practice occurred, rather than to whether the practice narrowed or widened the interpretation of a treaty. That said, he took the point made by Mr. Murphy that the Commission had already determined the existence of subsequent practice establishing the agreement of the parties, so it might be problematic to include such wording in the draft conclusion. Again, that could be discussed in the Drafting Committee.

With respect to draft conclusion 10, paragraph 1, he supported the amendment to the second sentence proposed by Ireland, since it more accurately reflected what the Commission was trying to achieve with that sentence and ought to be considered.

The Special Rapporteur had spent some time explaining why the amendment to draft conclusion 13 should be accepted. That was the only one of the Special Rapporteur's recommendations to which he was strongly opposed. However, he did not disagree with its content. The pronouncements of expert treaty bodies could, of course, contribute to interpretation under the Vienna rules. However, he did not think that the issue was part of the topic.

Not all true statements that related to interpretation deserved to be reflected in the draft conclusions. For example, judgments of international courts could contribute to the interpretation of treaties, but they were not included in the draft conclusions, because they did not constitute subsequent practice, as defined by the Commission. Important though they might be, pronouncements by expert treaty bodies were not subsequent agreements or subsequent practice, as defined, and they therefore fell outside the scope of the topic. If the Commission wished to determine the role

of such pronouncements, it should include that topic on its agenda, so that it could be examined in all its dimensions. As already noted by Mr. Park, Mr. Hassouna and Mr. Murphy, draft conclusion 13 had been the product of a careful compromise. The Commission had succeeded in striking a balance between normative relevance and faithfulness to the Vienna Convention in the draft conclusion. Inserting wording that had already been rejected by the Commission would threaten that balance and the Commission should refrain from disturbing it. He fully shared Mr. Park's comments in that regard.

In conclusion, he thanked the Special Rapporteur for his hard work and leadership role in helping to bring the topic to a successful conclusion.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the topic of peremptory norms of general international law (*jus cogens*) was composed of Mr. Cissé, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Huang, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Tladi (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), ex officio.

The meeting rose at 12.25 p.m.